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NO. [redacted] 45

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. [redacted]

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH N. JUHL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT, KENNETH N. JUHL, IN OPPOSITION

Francis J. Steiner, Jr.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 1212

UNITED STATES OF AMERICA, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
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MEMORANDUM FOR THE RESPONDENT,
KENNETH N. JUHL, IN OPPOSITION

This case involves a court martial that convicted respondent by assuming a power specifically withheld from it. Section 153(a) of the Manual for Courts-Martial is an express injunction to the court martial panel that it "cannot" base a conviction "upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable."[1] This limitation on the power of the court martial to act was ordered by the President and approved by Congress. (App. C, 102, 103,105,109)

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1. Since Section 153(a) is jurisdictional it can not be waived, but even if it could, there was no waiver here. A waiver must be clear. (App. C, 99, 100)

The only testimony supporting the charges on which respondent was convicted was that of Hughes, a named accomplice. Hughes was an admitted perjurer and crook. Heavy pressure was put on Hughes to testify against respondent and after he agreed to so testify he was, while serving his sentence, given many special privileges such as Christmas leave and permission to attend movies with his wife. His testimony was replete with inconsistencies and self-contradictions, which are patent on the face of the record. His testimony was not corroborated by any witness.[2] (App. C, 93,96,97, 102,118,119)

To determine these facts the evidence did not have to be evaluated or reweighed concerning any controverted fact. The record had to be read but the facts as found by the Court of Claims were apparent on the face of the record and uncontroverted.

No Board or judicial direct review of the usurpation of power by the court martial was afforded respondent. His suit in the Court of Claims is the only judicial review he was able to secure. Judicial review of an unquestionable arbitrary action in excess of granted power is required to insure fundamental fairness. Thompson v. City of Louisville, 362 U.S. 199; Shuttlesworth v. City of Birmingham, 382 U.S. 87; Shaw

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2. The Government states in its brief that Hughes' testimony was corroborated by his wife. However, such corroboration is not shown by the record. She was only put on in rebuttal so the Government must not have considered her testimony sufficient corroboration to offer as part of their case in chief. (App. C, 94, 95)

v. U.S., 174 Ct. Cl. 899, 357 F.2d 949. And where injustice and lack of fairness is fundamental and patent as in this case, our law does provide a judicial remedy. Harmon v. Brucker, 355 U.S. 579; Estep v. U.S., 327 U.S. 114; Shaughnessy v. Pedreiro, 349 U.S. 48.

The opinion in the Court of Claims was not a departure from established law and the finality clause in the Uniform Code of Military Justice did not establish new standards for habeas corpus. In Gusik v. Schilder, 340 U.S. 128, The Court rejected the argument that the finality clause changed the scope of review by the courts, holding instead that the recently enacted clause merely restated the scope of review previously in effect. This holding was reaffirmed in Burns v. Wilson, 346 U.S. 137, in which the Court again refused to hold that the finality clause precluded judicial review by civilian courts. The Court said it would not reevaluate the evidence amounting to a trial de novo but that it would search the record to assure the accused received the rudimentary fairness required by law.

The Government's main argument appears to be that the Court of Claims has no habeas corpus jurisdiction. However, such jurisdiction has been recognized. Shapiro v. U.S., 107 Ct. Cl. 650, 69 F. Supp. 205; Shaw v. U.S., supra. There are no significant differences between a habeas corpus action for release or on action for pay or similar

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3. The administrative review in the Shaw case, supra, was well after the enactment of the finality clause and the Government made the same argument in that case and other past cases for finality of the court martial decision that it now makes.

relief based on an unjust conviction. Ashe v. McNamara, 355 F.2d 277; Shaw v. U.S., supra; cf. Estep v. U.S., supra. (App. C, 104-109)

The Government suggests as a reason for reviewing this case that it would be difficult to retry the respondent because of the lapse of time. However, this is not a procedural error which would permit the Government a new trial. The Government had an opportunity to present all its evidence, which it did, and that evidence was not sufficient to convict. So the argument about delay has no relevance to the respondent's case.[4]

This case merely involves an issue of a Court-martial exceeding its power to act. The decision of the Court of Claims does not depart from any settled principle of law or conflict with the decisions of this Court or of the other courts of appeals and it presents no question warranting further review.

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4. The Government also implies that the Court of Claims rejected Ashe v. McNamara, supra. However, the Court cited that case with approval on the theory that the finality clause was not absolutely final (App. C, 102). The Court's other discussions of the case merely showed it was not necessary to consider the action of the Correction Board since the Court had authority to review the court martial itself. (App. C, 88, 101)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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I, Francis J. Steiner, Jr., attorney for the respondent, Kenneth N. Juhl, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4TH day of April, 1968, I mailed a copy of the foregoing memorandum in a duly addressed envelope, with air mail postage prepaid to the Honorable Erwin N. Griswold, Solicitor General, U. S. Department of Justice, Washington, D. C. 20530

Francis J. Steiner Jr.

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